No. 71-692

In the
Supreme Court of the United States
October Term, 1971

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

DONALD SOMERVILLE,
Respondent.

(On Writ Of Certiorari To The Court
Of Appeals For The Seventh Circuit)

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The question presented is whether a mistrial declared after the impaneling of a jury, upon motion of the prosecution alleging a fatally defective indictment, and over the objection of the defendant, constitutes a bar to reprosecution under the double jeopardy provision of the Fifth Amendment made applicable to the States by the Fourteenth Amendment.

ARGUMENT

I.

IN A JURY TRIAL, JEOPARDY ATTACHES WHEN THE JURY IS IMPANELED.

The Court has made perfectly clear that the point at which jeopardy attaches in a jury trial is the impaneling of the jury. *Downum* v. *United States*, 372 U.S. 734, 735-36 (1963).

The State's attempt to argue that attachment of jeopardy is precluded when the first trial was upon a jurisdictionally defective indictment unless the first trial ended in acquittal as in *Ball* v. *United States*, 163 U.S. 662 (1896) is effectively refuted by *Downum*.

The Court in *Ball*, considering a case which had been tried to a verdict of acquittal, made its determination that jeopardy had attached. However, this is not to say that had the case or trial in *Ball* not developed or progressed as fully as it did, that jeopardy would not have attached. *Ball* had no occasion to determine and definitely did not consider such an issue. Thus, *Ball* does not stand for the proposition that the attachment of jeopardy requires a complete trial and a verdict of acquittal. Indeed, assuming *arguendo* this was the conclusion of *Ball*, that conclusion would necessarily have been overturned by *Downum*.

In *Downum*, as was the circumstance in respondent's trial herein, the case was called, both sides announced ready and the jury was selected and sworn. The extent of court proceedings was identical in this case and

Downum. (The reason stated by the prosecutor for discharging the jury in *Downum*—i.e., that he was not ready to proceed—differed, a difference of no significance). In *Downum*, as here, the impaneled jury was discharged over defendant's objections.

Thus, *Downum* makes it clear that jeopardy attached in respondent's first trial. The Seventh Circuit recognized this fact in its most recent decision herein, 447 F.2d 733, 734 (1971), when it quoted *Green* v. *United States*, 355 U.S. 184, 188 (1957):

> "Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."

II.

THAT THE DISMISSAL OF THE FIRST TRIAL WAS BASED ON AN ALLEGEDLY FATALLY DEFECTIVE INDICTMENT DOES NOT AFFECT THE ATTACHMENT OF JEOPARDY.

The initial point to be made is that the only case which specifically considers the instant issue, *Ball*, is conspicuous by its absence from Argument I of the State's brief which takes the position that a jurisdictionally defective indictment should not bar reprosecution. A reading of *Ball* and of *Benton* v. *Maryland*, 395 U.S. 784 (1969), clearly refutes the State's argument.

In *Ball*, the Court had before it a fact situation legally similar to the instant fact situation. In *Ball*, the first indictment "was fatally defective," id. at 664, as the result

of a legal omission or neglect by the prosecutor. Admittedly, in *Ball*, the proceedings on the original fatal indictment did proceed to a verdict of acquittal. The State is accordingly and understandably limited and forced to attempt to distinguish *Ball* on this factual dissimilarity. Such a distinction is unwarranted in law.

The extent or degree of proceedings in a case, however, is and can be pertinent to a double jeopardy issue only in one respect. The threshold and, for that matter, the only concern a court must have as to the progress or stage reached in the chronology of the case, or trial, is in determining if jeopardy attached. (This was the issue already considered in Argument I). Assuming jeopardy did attach here—a conclusion urged in the preceding argument—the relative stages or development of the case and trial are of no consequence.

Importantly, then, although *Ball* did not reach one of the issues now before the Court—*i.e.*, does jeopardy attach when the jury is selected and sworn—this issue was decided in *Downum*, as developed in our initial argument. For this reason reliance on *Ball* as to *when jeopardy attaches*, as distinct from the issue actually decided by *Ball* relative to the consequence of a "fatally defective" indictment on jeopardy, is misleading and totally unavailing. Accordingly, emphasis on the acquittal in *Ball* is unresponsive to the second issue now before the court—*i.e.*, what consequences, if any, a defective indictment has on whether or not jeopardy attaches.

The fundamental error in the State's argument is its emphasis on the effect of a fatally defective indictment. The consequence of such a fatally defective indictment on the attachment of jeopardy—or rather the lake of consequence— is considered and explained by the Court in *Ball* and in *Benton*.

In *Ball*, despite the fact that the indictment did not allege all the essential elements of the crime for which defendant was tried, the trial upon that defective indictment acted as a former jeopardy barring reprosecution for the same offense. Similarly, in the instant case, the first trial was aborted as a result of the prosecution's failure to allege all the essential elements of the offense charged in the indictment. The conclusion is inescapable that, since jeopardy had attached in the first trial according to the standards announced in *Downum*, reprosecution for the same offense was a violation of respondent's constitutional protection against double jeopardy.

The State attempts to limit the effect of *Ball* by creating a distinction between "void" and "voidable" indictments and making that distinction crucial to an accused's protection against double jeopardy. Even granting that *Ball* suggests the existence of such a distinction and its applicability to double jeopardy situations, the State's argument has recently been rejected by the Court.

In *Benton*, the Court considered and rejected the State of Maryland's contention that, because the indictment upon which the first trial was based was void, the first trial was conducted before a court which was without jurisdiction, thus preventing the attachment of jeopardy. *Id.* at 796-97. Even Mr. Justice Harlan, who dissented, agreed:

> "The State's contention that petitioner's first trial was a complete nullity because the trial court lacked jurisdiction is unconvincing." (*Id.* at 810-11.)

The Court, in *Benton*, implicitly rejecting the use of *Ball* as authority for Maryland's argument, stated that, instead, *Ball* directed the conclusion that Maryland's argument was invalid. *Id.* at 797.

Thus, a reading of *Ball* and of *Benton* lead inevitably to the conclusion that, a fatally defective indictment does not prevent the attachment of jeopardy, and that his conclusion holds true even in the face of an argument urging that the first indictment was "void." Hence, jeopardy did attach, at respondent's first trial, because the jury was impaneled at the time a mistrial was declared, notwithstanding the State's argument that the trial court was "without jurisdiction" and that the indictment was "void".

III.

THE CIRCUMSTANCES SURROUNDING THE DECLARATION OF MISTRIAL DO NOT REVEAL THE MANIFEST NECESSITY NECESSARY TO CREATE AN EXCEPTION TO THE BAR AGAINST REPROSECUTION AFTER JEOPARDY HAS ATTACHED.

There can be no question that the Court has created exceptions to the bar against reprosecution following attachment of jeopardy when the circumstances revealed a "manifest necessity" for the declaration of mistrial. It is also clear that the existence of "manifest necessity" is not lightly to be inferred. As was said in *Downum*, 372 U.S. at 736:

> "The discretion to discharge a jury before it has reached a verdict is to be exercised, only in very extraordinary and striking circumstances, to use the words of Mr. Justice Story in United States v. Coolidge, 25 Fed. Cas. 622, 623.

Accordingly, the following have been found to be circumstances of sufficiently serious magnitude to justify an exception to the protection against double jeopardy: a "hung jury," *Keerl v. Montana*, 213 U.S. 135 (1909); tactical problems confronting an army in the field as affecting a court martial, *Wade v. Hunter*, 336 U.S. 684

(1949); juror bias, *id.*; *Thompson* v. *United States*, 155 U.S. 271 (1894); or where the conduct or motion of the defendant causes the dismissal. *United States* v. *Tateo*, 377 U.S. 463 (1964). However, none of these circumstances exist in the instant case nor do any of the above cases contain any suggestion that prosecutorial negligence would constitute "manifest necessity."

At best, the State's argument would promote the protection of judicial economy—a value of some worth, but not comparable to the constitutional value embodied in a defendant's right to proceed to verdict once a jury has been impaneled.

The State fails to recognize the importance the Court has attached to a defendant's right to be tried by the jury he initially assists in selecting. In *United States* v. *Jorn*, 400 U.S. 470, 484 (1971), the Court pointed out that

> "... the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the *first* jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendants's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a *particular* tribunal.' See *Wade* v. *Hunter*, 336 U.S., at 689, 69 S.Ct., at 837." (emphasis added).

Obviously, it matters not to the defendant whether the mistrial was the fault of the judge, as in *Jorn*, or of the prosecution, as in the instant case. In either event, he is deprived of his right to be tried by the jury he first helps select—a right of constitutional magnitude.

In addition to the foregoing, a crucial fact to be noted is that none of these problems would have arisen but for the fault of the prosecution. The Court has not been insensitive to the deprivation of a defendant's rights due to prosecutorial misfeasance. In *Ball*, the Court was most appreciative of the decisive fact that the prosecutor (not the defendant) was responsible for the error in the proceedings, quoting with approval an earlier dissenting opinion of Justice Livingston in *People* v. *Barrett*, 1 *Johns.* 66, 74 (1806):

> "This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it is to frame a correct bill, openly alleging his own inaccuracy or neglect. That a party should be deprived of the benefit of an acquittal by a jury on a suggestion of this kind, coming too from an officer who drew the indictment, seems not to comport with that universal and human principle of criminal law, 'that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If that practice be tolerated, when are trials of the accused to end!" (163 U.S. at 667-68.)

The Court, in *Ball*, similarly recognized that there were potential abuses in allowing a prosecutor to take advantage of an inaccurate indictment even before the verdict is reached. The Court once again quoted from *Barrett*, at 74, in a passage equally applicable to a prosecutor who dislikes the first jury selected:

> ". . . Suppose an acquittal [is imminent—even if only in the mind of the prosecutor] . . . the prosecutor, if he be dissatisfied and bent on conviction, has nothing to do but tell the court that his own indictment was good for nothing; that it has no venue, or

> is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties*." (163 U.S. at 668.)

The Seventh Circuit, in its most recent decision in the instant case, took care to point out that where a mistrial is declared without any affirmative action on the part of the defendant, as in *Downum*, *Jorn* and this case, a double jeopardy claim will be successful. The court then quoted Mr. Chief Justice Burger, 447 F.2d at 735, from his concurring opinion in *Jorn*:

> "If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense."

CONCLUSION

The only conclusion to be distilled from a reading of *Downum*, *Ball* and *Benton* is that, the drafting of a defective indictment by the prosecutor cannot and does not prevent attachment of jeopardy upon swearing of the jury. *Downum* concludes jeopardy attaches when the jury is sworn. *Ball* concludes a fatally defective indictment does not preclude the attachment of jeopardy. *Benton* rejects any exception based upon the contention that the indictment was "void." This conclusion assumes, as is the fact here, that the defendant did not cause the error in the first proceeding, nor was it upon his motion (or appeal) that the mistrial (or reversal) was declared. It is further urged that prosecutorial error is not that kind of circumstance the Court has held to be "manifest necessity" justifying retrial even though jeopardy has attached.

Respondent thus respectfully prays that the Court will affirm the decision of the Seventh Circuit.

Respectfully submitted,

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